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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 CHARTER COMMUNICATIONS, INC.,

5 Petitioner,

6 v.

20 CV 7049 (KPF)

20 CV 7050 (KPF)

7 KARIN GARFIN,

8 Respondent.

9 -----x

10 KARIN GARFIN

11 Plaintiff,

New York, N.Y.

September 11, 2020

2:00 p.m.

12 V.

13 CHARTER COMMUNICATIONS, INC.

14 Defendant.

15 -----x

16 Before:

17 HON. KATHERINE POLK FAILLA,

18 District Judge

19 APPEARANCES

20 MORGAN, LEWIS & BOCKIUS, LLP  
21 Attorneys for Plaintiff

22 BY: JASON D. BURNS

23 MELISSA C. RODRIGUEZ

24 GODDARD LAW, PLLC

25 Attorneys for Defendant

BY: ANTHONY P. CONSIGLIO

K9B6CHAC

(Case called; telephone conference)

THE DEPUTY CLERK: Your Honor, this is the matter of  
20 CV 7049, Charter Communications, Inc. V Garfin; and 20 CV  
07050, Garfin v. Charter Communications, Inc.

In 20 CV 07049, please state your names for the  
record.

MS. RODRIGUEZ: Melissa Rodriguez with Morgan Lewis.  
With me is my colleague Jason Burns, also with Morgan, Lewis &  
Bockius. And we're the attorneys for the petitioner, Charter  
Communications, Inc.

Good afternoon.

THE COURT: Good afternoon. Ms. Rodriguez.

To whom, you or Mr. Burns, should I be directing my  
questions?

MS. RODRIGUEZ: To me, your Honor.

THE COURT: Thank you for letting me know.

Representing Ms. Garfin.

MR. CONSIGLIO: Anthony Consiglio, Goddard Law.

Good afternoon, your Honor.

THE COURT: Sir, good afternoon. You came in a little  
bit garbled there. May I have your last name again, please.

MR. CONSIGLIO: Consiglio.

THE COURT: Good afternoon to you, sir, as well.

Thank you to all of you for participating in this  
telephonic conference. I begin by wishing to each of you

K9B6CHAC

1 safety and good health to you, your families and clients during  
2 this pandemic.

3 I am not sure that it matters whether I begin with the  
4 7049 case or the 7050 case. So, Mr. Consiglio, I think it is  
5 easier if I begin with you. Sir, I have read the complaint  
6 that was included in with the writ of removal. I am not sure  
7 there is anything further you want me to know on that front;  
8 but if there are issues specific to the complaint that you want  
9 to bring to my attention, will you please let me know.

10 MR. CONSIGLIO: I can't think of any, your Honor. If  
11 I do think of something, I will let you know.

12 THE COURT: Thank you very much.

13 Sir, am I correct that your client worked for Charter  
14 or an organization within Charter until some time in 2017?

15 MR. CONSIGLIO: Correct. It was a short employment.

16 THE COURT: Okay. I saw reference to a prior state  
17 court proceeding in 2019 that was dismissed without prejudice.

18 Am I correct about that as well?

19 MR. CONSIGLIO: I am not up to date on what that was  
20 exactly. I was not with the firm at that time. I have been  
21 reviewing the case, but I think I did see something.

22 Perhaps Ms. Rodriguez can tell us what that is.

23 THE COURT: Yes. What I am seeing is a reference in  
24 the petition to compel arbitration at paragraph 5 and 6 to a  
25 2019 action brought in New York Supreme Court.

K9B6CHAC

1 Ms. Rodriguez, can you please provide information to  
2 me on that action.

3 MS. RODRIGUEZ: Sure. You are correct, your Honor.  
4 Back in 2019 Mr. Garfin commenced an action in the Supreme  
5 Court of the State of New York County of New York by filing a  
6 summons with notice. A complaint was never filed or served on  
7 Charter. That action was voluntarily discontinued in May of  
8 2019 again without a complaint ever been served on Charter.

9 THE COURT: Thank you.

10 Mr. Consiglio, there are other individuals who are  
11 named in the state court complaint that was removed to me.  
12 Specifically, sir, there was I believe a Mr. Dugan, a  
13 Ms. Gruber, and a Ms. De Leon.

14 Would you tell me, please, if any or all of those  
15 defendants were served prior to the removal of the case.

16 MR. CONSIGLIO: No, they were not.

17 THE COURT: Have they been served since then, sir?

18 MR. CONSIGLIO: No, they have not.

19 THE COURT: You will please excuse me if this sounds  
20 very basic, but is it your client's intention to serve them?

21 MR. CONSIGLIO: Yes.

22 THE COURT: Great.

23 MR. CONSIGLIO: We'll have to arrange that.

24 THE COURT: That's in fact the question.

25 Ms. Rodriguez, are these individuals current employees

K9B6CHAC

1 of Charter Communication.

2 MS. RODRIGUEZ: Mr. Dugan is currently employed by  
3 charter. The other two individuals are not.

4 THE COURT: Have there been discussions about your  
5 firm representing Mr. Dugan as well?

6 MS. RODRIGUEZ: Yes. There have been discussions to  
7 that effect. Nothing has been formalized as of yet, but the  
8 intent will be to represent Mr. Dugan and also at this point  
9 also the two other two individuals if we can get to them.  
10 Nothing has been formalized, but those discussions have been  
11 had.

12 THE COURT: If it were the decision to represent the  
13 three individuals, would you be waiving the service requirement  
14 and accepting service on their behalf?

15 MS. RODRIGUEZ: I would need to consult with them and  
16 see if that is something they would authorize me to do.

17 THE COURT: Why I am asking is Mr. Consiglio and I  
18 will happily sit by the sidelines and I presume he would not  
19 want to incur the expense of service or the potential  
20 convenience to the recipience of service if it turns out you  
21 will be accepting service on their behalf.

22 Do you have a sense, Ms. Rodriguez, as to when you  
23 would know?

24 MS. RODRIGUEZ: I will ask them immediately after this  
25 call and hope to get an answer back from them immediately. We

K9B6CHAC

1 really did not discuss that at all.

2 THE COURT: Of course. I understand that this is a  
3 proceeding that hasn't been long in the works.

4 May I understand so that I don't have to follow up on  
5 it that you will reach out these individuals, check out their  
6 views about representation and service and get back to Mr.  
7 Consiglio with their views within the next week?

8 MS. RODRIGUEZ: Yes, I can do that.

9 Mr. Consiglio, can you standdown for a week while we  
10 figure out the service issues?

11 MR. CONSIGLIO: Absolutely, yes.

12 If I can add to that of course we always try to  
13 minimize any unnecessary expenses such as service.

14 THE COURT: I appreciate that. So I will make a note  
15 to myself that within a week there will be some clarity as to  
16 these issues.

17 Mr. Consiglio, I have been reading the notice of  
18 removal and I have reading the petition to compel arbitration.  
19 I know you have had the opportunity to do that as well. I am  
20 sure it is the case that I simply don't have all the facts  
21 here. It would not have been crazy for Charter to think that  
22 Ms. Garfin was going to be proceeding with arbitration in 2020  
23 and yet suddenly she wasn't.

24 Could you help me understand, first of all, whether  
25 the sequence of events that is set forth in the petition to

K9B6CHAC

1 compel arbitration at paragraph 6 through 14 or so is accurate  
2 as you understand the facts and then let me know what happens?

3 MR. CONSIGLIO: I will do my best, your Honor. The  
4 complicated history, which I am still absorbing and learning  
5 there were two arbitration agreements at issue during Ms.  
6 Garfin's employment. They were both opt-out agreements and do  
7 not require a signature.

8 The second one was sent to her at the actual end of  
9 work before her paychecks stopped. I think there was a period  
10 six weeks or so which that second agreement was sent and was  
11 sent to her work email account, which she did not have access  
12 to. In fact, she had received something from Charter at her  
13 personal email account during those weeks but not an  
14 arbitration agreement. I am thinking this is what was going on  
15 in 2019 but I could be wrong, but at that time there was --  
16 well, I don't know what was going on in 2019.

17 I believe in 2020 we understood that there was an  
18 arbitration agreement, but there was a big mixup about which  
19 arbitration we were talking about and then there was a further  
20 mixup Ms. Garfin was not aware of any second agreement. So we  
21 had discussed -- this is my understanding and please don't hold  
22 me to all the details -- with Ms. Rodriguez an arbitration and  
23 that was understood by us to mean -- well, I think we had some  
24 misunderstandings in our office as well. So I think somebody  
25 in our office understood that to be the AAA arbitration and

K9B6CHAC

1 some of us understood it to be the first arbitration that Ms.  
2 Garfin herself was aware of, which was at JAMS.

3 Then after we commenced the arbitration proceedings,  
4 and those were commenced at JAMS if I am not mistaken, then we  
5 had further discussion with Ms. Rodriguez about it and my  
6 understanding is that Charter let us know that we were mistaken  
7 in starting that arbitration proceeding not because it was at  
8 JAMS but because under the AAA arbitration agreement, Charter  
9 was to commence the proceeding and Charter would only be doing  
10 that after an internal proceeding. So that Charter was  
11 communicating to us Ms. Garfin has not gone through required  
12 internal proceedings.

13 THE COURT: Sir, one moment, please. Thank you for  
14 both myself and the court reporter.

15 When you say "internal proceedings," is that what is  
16 referred to in the petition as the Solution Channel Program  
17 with initial capital letters?

18 MR. CONSIGLIO: Yes.

19 THE COURT: Thank you.

20 Once you learned of that, what happened?

21 MR. CONSIGLIO: Well, my understanding is that was  
22 approximately July 6th and the following week a decision was  
23 issued in the New York County Supreme Court interpreting CPLR  
24 7515. I think we had not learned about that decision. It was  
25 issued on July 13. I believe it came to our attention either



K9B6CHAC

1 the end of July or beginning of August. It was not a published  
2 decision. Under that decision, the arbitration agreements  
3 purporting to require arbitration of discrimination claims  
4 under state and city law are null and void under this statute,  
5 which the legislature acted to create and modify for this very  
6 purpose so that employees are not lured into arbitration if I  
7 can put it that way.

8 THE COURT: Yes, let's not put it that way. I am not  
9 making any findings about bullying. Thank you.

10 You don't dispute, sir, that you or one of your  
11 colleagues in fact said to Charter, We would like to request  
12 arbitration of our client, Karen Garfin's, claims; correct?  
13 You did in fact say that?

14 MR. CONSIGLIO: That is one of the attorneys, correct,  
15 to the best of my knowledge.

16 THE COURT: Okay. But in August Charter submitted  
17 your clients demand to AAA, yes?

18 I am seeing that in the recitation of events by  
19 Ms. Rodriguez. I guess your point is some time after  
20 August 4th, maybe indeed some time after August 13th, you  
21 became aware of the New York State Supreme Court decision?

22 MR. CONSIGLIO: Correct. I don't know the dates.

23 THE COURT: Sir, this is a decision at the trial court  
24 level. I want to make sure I am hearing this right. The New  
25 York Supreme Court, not the New York State Court of Appeals or

K9B6CHAC

1 appellate division?

2 MR. CONSIGLIO: That's correct. That has since been  
3 appealed to the appellate division.

4 THE COURT: All right. We'll see what they do.

5 So I don't want to read too much into what you are now  
6 telling me, but I suspect what you are going say with the  
7 issuance of this decision you and your client rethought the  
8 propriety of arbitration and elected not to, yes?

9 MR. CONSIGLIO: The issuance of that petition and with  
10 our understanding of the origin of the arbitration agreement  
11 and the fact that we believe Karin Garfin did not agree to  
12 arbitration.

13 THE COURT: Okay. Thank you.

14 Ms. Rodriguez, are you familiar with the decision to  
15 which Mr. Consiglio is citing?

16 MS. RODRIGUEZ: Yes, I am.

17 THE COURT: Could you tell me about it? If it is  
18 discussed in the papers, I am not sure that I paid attention to  
19 it. You can tell me if it is there and I should have seen it.

20 MS. RODRIGUEZ: I think in our memo of law it was  
21 addressed in a footnote, but no problem I am happy to talk  
22 about that case.

23 In that case what the court found was that provision  
24 under CPLR -- I lost the section. The provision under CPLR  
25 that was amended to preclude mandatory arbitration agreement in

K9B6CHAC

1 the context of employment discrimination cases that that  
2 provision is not preempted by the Federal Arbitration Act, FAA.  
3 In that case, the Court rendered a decision on the basis of  
4 their not being any allegations concerning interstate commerce.

5 With respect to the court in New York with the need  
6 that their understanding of the concept of interstate commerce  
7 in that state was incorrect. In any case, that case is also  
8 factually indistinguishable in that there is an allegation of  
9 conduct that occurred allegedly -- alleged conduct that  
10 occurred outside of New York and physically in Connecticut.  
11 And also the fact that the parties through the arbitration  
12 agreement are from different states also make this an  
13 interstate commerce contract in and of itself. So we believe  
14 the decision was incorrect in holding that that provision of  
15 the CPLR is preempted by the FAA federal courts have found and  
16 as we noted in our memoranda of law. Also in any case that  
17 case is distinguishable for the reasons I just mentioned.

18 THE COURT: I understand.

19 So, Mr. Consiglio, I think I have a sense of the  
20 reason why your client changed her mind -- why you and your  
21 client changed your minds. I don't want to cut you off if  
22 there are other things you want to talk to me about, but I will  
23 move on if you told me what you wanted to.

24 MR. CONSIGLIO: Yeah. I just think the fact and the  
25 law is complicated enough that I can't possibly even try to

K9B6CHAC

1 summarize it all. It will require briefing of course.

2 THE COURT: Of course. You are anticipating my next  
3 question. We have two cases. Sometimes I have two cases that  
4 are mirror images of each other. These are just not quite  
5 because one is a petition to compel arbitration and the other  
6 is the removed case from state court. It was my intention to  
7 stay one of them and work through the other on the issue of  
8 arbitration. I didn't think we needed to do both at the same  
9 time. My thought was that either we can have an opposition to  
10 the petition to compel arbitration in 7049 or we could have a  
11 motion to compel arbitration in 7050 that looks suspiciously  
12 like the petition to compel arbitration. I am a bit agnostic  
13 as to between the two.

14 Mr. Consiglio, do you agree with me that what we have  
15 to do at the moment is figure out whether this arbitration  
16 agreement is valid in this setting or not?

17 MR. CONSIGLIO: Yes. That's my understanding as well.  
18 The cases I have looked at say quite explicitly that if there  
19 is no essential difference between proceeding to compel  
20 arbitration and a motion within a case. So I am not aware of  
21 any reason to worry about that.

22 THE COURT: Mr. Consiglio, given that 7049 is one case  
23 number earlier than 7050, would you be able to file an  
24 opposition to the petition to compel arbitration that explains  
25 to me with more detail exactly when you have been talking about

K9B6CHAC

1 today regarding the development in New York state law and the  
2 reasons why you believe that controls or should influence the  
3 decision here?

4 MR. CONSIGLIO: Yes.

5 THE COURT: And then in so doing, would you be  
6 comfortable, and I hope the answer is yes, if I stayed 7050  
7 until we can have worked out this issue?

8 MR. CONSIGLIO: I think that makes sense.

9 THE COURT: Ms. Rodriguez, do you agree?

10 MS. RODRIGUEZ: Yes, I do.

11 THE COURT: Mr. Consiglio, how much time would you  
12 like for your response in this 7049 case?

13 MR. CONSIGLIO: Well, I believe in my letter motion I  
14 said October 19. Although that date looks scarily near, I  
15 think it is fair for me to say that we should be able to do it  
16 by that date. We do have two attorneys out of four attorneys  
17 who are on extended leave. That is my only sort of big worry.

18 THE COURT: Of course.

19 MR. CONSIGLIO: We will endeavor and hopefully we'll  
20 be able to meet that deadline.

21 THE COURT: Let me do this: Ms. Rodriguez, I will  
22 tell you that I am a judge who prefers to have an extended  
23 deadline rather than to give extensions. Do you have any  
24 problem if I were to give Mr. Consiglio until the 30th of  
25 October in order to submit his opposition?

K9B6CHAC

1 MS. RODRIGUEZ: No problem at all, your Honor.

2 THE COURT: Okay.

3 So, Mr. Consiglio, I am giving you until the 30th.

4 You should be okay, yes?

5 MR. CONSIGLIO: I appreciate that very much, your

6 Honor.

7 THE COURT: Of course. These are strange times, sir.

8 Ms. Rodriguez, would I be able to have your reply, if

9 there is a reply, by the 13th of November?

10 MS. RODRIGUEZ: Your Honor, could I ask for an  
11 additional week only because I suspect I will be engaged in a  
12 hearing that week?

13 THE COURT: Listen, I will be generous to both sides  
14 and understanding that both sides at least for this conference.  
15 So the 20th of November is fine by me. We'll put a minute  
16 entry that puts that together.

17 May I ask as well, Ms. Rodriguez, if you or your firm  
18 could arrange to obtain a transcript of this conference in the  
19 ordinary course so that when the briefing is concluded, I will  
20 be able to refer back to this conference?

21 MS. RODRIGUEZ: Absolutely, your Honor.

22 THE COURT: Mr. Consiglio, just one other thing that  
23 you may or may not be aware of. If you will indulge me for a  
24 moment. Some 20 years ago I was a midlevel associate at the  
25 Morgan Lewis & Bockius firm. Indeed, that was 20 years ago. I

K9B6CHAC

1 don't think it is a basis for my recusal as I have no financial  
2 interest in the firm and it has been quite so long. If you  
3 believe otherwise, you will let me know, correct, sir?

4 MR. CONSIGLIO: We don't want you to recuse yourself.  
5 We have utter faith in your attention, your Honor.

6 THE COURT: I appreciate that.

7 Mr. Consiglio, I think we have a plan going forward  
8 for both the 7409 and 7050 case.

9 Is there anything else you would like to address with  
10 me in this proceeding today?

11 MR. CONSIGLIO: I don't think so.

12 THE COURT: Thank you very much.

13 Ms. Rodriguez and Mr. Burns, anything else you would  
14 like me to know today?

15 MS. RODRIGUEZ: Nothing from us, your Honor. Thank  
16 you.

17 THE COURT: I wish you well and I thank you.

18 We're adjourned.

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